IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

PRE-FAB TRANSIT CO.,
Appellant

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION *et al.*,
Appellees

On Appeal from the United States District Court for the Southern District of Illinois, Southern Division

JURISDICTIONAL STATEMENT

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December 1969

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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JURISDICTIONAL STATEMENT

Appellant Pre-Fab Transit Co. appeals from a final judgment of the United States District Court for the Southern District of Illinois, Southern Division, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court, not yet reported, is set forth in Appendix A hereof. The report and order of the Interstate Commerce Commission appear at 107 M.C.C. 383.

JURISDICTION

This action was brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325 to enjoin and set aside the report and order of the Interstate Commerce Commission in MC-C-5102, *Miami Transportation Company, Inc. of Indiana* v. *Pre-Fab Transit Co.** An opinion and order of the three-judge district court, sustaining the orders of the Commission, were entered September 3, 1969. A final order (Appendix B hereof) denying Appellant's Motion to Amend Judgment or to Grant a New Trial, was entered September 26, 1969. Appellant filed its Notice of Appeal on October 27, 1969, and its Supplemental Notice of Appeal on November 20, 1969.

The jurisdiction of the Supreme Court to review the judgment of the district court by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349 (1936); *New England Divisions Case*, 261 U.S. 184 (1923).

STATUTES INVOLVED

Sections 206(a)(1) and 212(a) of Part II of the Interstate Commerce Act (49 U.S.C. §§ 306(a)(1) and 312(a)) are set forth in pertinent part in Appendix C hereof.

QUESTIONS PRESENTED

Whether the Commission, having guaranteed Plaintiff a plenary hearing in a general investigatory proceeding on the interpretation of Part A of its certificate, and aware that Plaintiff sought such a hearing, may deny Plaintiff all opportunity to be heard by, first, delaying

* Appellant Pre-Fab Transit Co. earlier filed a motion to enforce a 1958 judgment entered by the United States District Court for the Southern District of Illinois, Southern Division, in *Pre-Fab Transit Co.* v. *United States*, Civil Action No. 2394. Its later complaint herein superseded all the issues raised by the motion.

the general investigatory proceeding and, then, without prior notice to Plaintiff of the possibility, deciding the issues in a severely limited, trivial, non-oral-hearing case.

Whether the Commission, having accorded a consistent interpretation to Part B of Plaintiff's certificate for ten years, and in over one hundred administrative and two judicial proceedings, may reinterpret and restrict that certificate, in a narrow, one-commodity complaint case, without affording Plaintiff an oral hearing and without alerting it to the possibility that Part B of its certificate was to be reinterpreted.

STATEMENT

In *Miami Transportation Company, Inc. of Indiana* v. *Pre-Fab Transit Co.*, MC-C-5102, the Commission rendered sweeping constructions of Pre-Fab's certificated authority, including both Parts A and B thereof. It did so despite its having so handled the case as to minimize its importance, to lead Pre-Fab to believe it involved a very narrow issue, and to avoid an oral hearing. Moreover, the Commission's contemporaneous institution and handling of a broad-gauge, investigatory proceeding both guaranteed Pre-Fab a plenary hearing, and confirmed to Pre-Fab that this second proceeding was the proper and intended vehicle where Pre-Fab would be fully heard prior to any (1) general interpretation of the previously unconstrued Part A or (2) modification of the long-settled construction of Part B. As to Part A, the Commission was well aware of Pre-Fab's desire and preparation for a hearing and, as to Part B, of Pre-Fab's belief that its interpretation was well settled and would not be modified, and certainly not without warning and hearing. Nevertheless, the Commission utilized the trivial, non-oral-hearing *Miami Transportation* case to issue its sweeping and economically damaging interpretation of Part A and modification of Part B, and discontinued the dominant proceeding.

Part A of Pre-Fab's authority has never previously been construed by the Commission, nor by any court.* Its proper construction is highly important, involving as it does the meaning of "prefabrication" and what constitutes "sections" of "prefabricated" or "precut" buildings or houses. It had become apparent to Pre-Fab, through both formal and informal proceedings, that the Commission, however expert it may be in the field of transportation, is not currently informed on the rapidly developing art of prefabrication and entertains views about the proportion of modern buildings which are prefabricated at sharp variance with the facts.

It was imperative to Pre-Fab that, prior to any construction of Part A, it have a full opportunity to inform the Commission and to lay before it the views on prefabrication of nationally renowned architects and builders. Such an opportunity came when the Commission, in March 1966, instituted an investigation into Pre-Fab's operations, styled *Pre-Fab Transit Co.—Investigation and Revocation of Certificates*, Docket No. MC-C-5106. The particulars furnished Pre-Fab by the Commission's Bureau of Enforcement as to the operations to be investigated disclosed that more than one hundred movements of over fifty commodities were involved. It was also apparent that many movements were involved which Pre-Fab believed were for the construction of "prefabricated buildings" and where the Commission presumably thought "prefabrication" was not involved. Since Part A of Pre-Fab's authority was granted solely to serve the prefabricated building industry, it was critically important to Pre-Fab that the Commission have a full awareness of the present extent and operations of that industry. Pre-

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* Part A authorizes Pre-Fab to transport in a ten-state area, centering around Pennsylvania: "*Prefabricated and precut buildings or houses*, complete, knocked down, or in sections, and *all component parts* necessary to the construction, erection, or completion of such buildings or houses, when shipped with same."

Fab deemed it prudent to, and did spend, over $120,000 in preparing for this all-important hearing.

A Commission order served in February 1967 scheduled the hearing for Chicago on March 20, 1967, a date subsequently postponed by the Commission for good reason to September 26, 1967. Pre-Fab appeared at the scheduled hearing, but the hearing necessarily aborted since the Commission had failed to send an examiner. The bobtailed record allowed by the Commission's attorney disclosed that Pre-Fab was represented by seven of its principal officers and that several of its planned series of expert witnesses were available in the room.

On April 16, 1968, the Commission rescheduled the hearing for Washington on June 17, 1968. Its subsequent order of May 8, 1968, postponed the hearing indefinitely. Its next order, of June 20, 1968, fixed the hearing for August 5, 1968. There were to be two further Commission orders in Docket No. MC-C-5106, converting procrastination in holding the hearing into refusal to hold it at all. The two orders, both dated July 23, 1968, cancelled the scheduled hearing and announced in four lines that for "good cause appearing" the proceeding was discontinued.

The "good cause" for Commission dismissal of this proceeding, and its guarantee of a hearing, unquestionably derived from the fact that the Commission, on June 14, 1968, had issued a sweeping interpretation of Part A of Pre-Fab's authority in *Miami Transportation Company, Inc. of Indiana* v. *Pre-Fab Transit Co.*, Docket No. MC-C-5102. This proceeding originated as a complaint by Pre-Fab's competitor, accusing it of transporting without authority a truckload of ornamental iron columns from Louisville, Kentucky, to Dunbar, West Virginia. Pre-Fab's reasonable belief that the proceeding involved only the legality of its transporting iron columns—and was a completely inappropriate vehicle to attempt to determine the state of the art of "prefabrication" or to

undertake a general construction of Part A of Pre-Fab's certificate—was immediately confirmed by two Commission actions. In the first place, the Commission designated this complaint for "modified procedure," a procedure which eliminates an oral hearing and relies on affidavits only. In the second place, and more importantly, a month after the complaint was filed, the Commission inaugurated the general investigatory proceeding (Docket No. MC-C-5106), above described, which was obviously intended as, and would have been, an appropriate vehicle for a definitive interpretation of Part A of Pre-Fab's authority.

The Commission thus utilized this trivial complaint proceeding, which has virtually no record, which scarcely mentions the word "prefabrication," and which had been pending decision almost two years, to issue a definitive and highly restrictive construction of Part A when Pre-Fab had been led to believe that no construction would be undertaken until after it had been afforded an opportunity to present expert views in a plenary hearing. The Commission also utilized this trivial case to modify the long-settled interpretation of Part B of Pre-Fab's authority. Again, the Commission so acted in the general investigatory proceeding as to ambush Pre-Fab, depriving it of the opportunity to be heard guaranteed by Section 212 of the Motor Carrier Act.

The Commission's first two interpretations of Part B,* grossly inconsistent with Part B's language and with each other, were both struck down judicially. In 1951, the Commission determined that Pre-Fab's authority to transport "*buildings*, complete, knocked down, or in sections, including all component parts, materials, supplies

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* Part B authorizes Pre-Fab to transport in a ten-state area, centering around Illinois: "*Buildings*, complete, knocked down, or in sections, including all component parts, materials, supplies, and fixtures, and when shipped with such buildings, *accessories* used in the erection, construction, and completion thereof."

and fixtures," did not permit the transportation of complete buildings, but only of materials necessary for erecting a complete building. Litigation instituted by Pre-Fab resulted in a sharp rejection of the view that "complete buildings" could not be transported. *Pre-Fab Transit Co.* v. *United States*, 262 F. Supp. 1009, 1013 (S.D. Ill. 1967).

In 1957, the Commission determined in *Whitehouse Trucking, Inc.* v. *Pre-Fab Transit Co.*, 71 M.C.C. 155, that while Pre-Fab could transport parts, materials, supplies and fixtures of buildings, it could do so only when they were transported "in connection with" a complete building. Again, the District Court for the Southern District of Illinois rejected this interpretation and held that Pre-Fab could transport parts, materials, supplies and fixtures of buildings either "independently of or in connection with the transportation of buildings." *Pre-Fab Transit Co.* v. *United States*, C.A. No. 2394, Southern District of Illinois, decided July 31, 1958, 13 Federal Carrier Cases 81, 208.

The Commission recognized the scope of the Court's determination as meaning that Pre-Fab could transport parts, materials, supplies, and fixtures of buildings without any other limitation provided only that they were intended for use in buildings. In over 80 formal proceedings, arising in a variety of ways, and in numerous informal rulings, the Commission over a decade reiterated this view. As examples, the Commission accepted Pre-Fab's filing of rates on building materials, though such rates had been suspended and were under investigation in 1958, when the District Court in Illinois acted. The Commission refused an applicant authority to transport building materials in certain areas of Michigan on the ground that Pre-Fab provided an adequate service. *Davis Extension—Upper Michigan*, 91 M.C.C. 623 (1962). It dismissed complaints charging Pre-Fab with transporting building materials; it limited authorities granted to

Pre-Fab on the grounds it already had authority to transport building materials; and it confirmed to inquiring shippers that Pre-Fab was authorized to transport building materials. There was, however, one instance in which the Commission slid away from this long-accepted interpretation and advanced the view that Pre-Fab could transport building materials only if intended for use in buildings themselves physically capable of transportation on the highways.*

Two definitive actions by the Commission in 1967 and 1968 apparently settled, once for all, the proper interpretation of Part B and reflected a full discard of the thesis expressed in *Oyler* that building materials could be transported only if intended for use in buildings themselves physically capable of transportation. In the investigatory proceeding, commenced by the Commission in March 1966 (see *supra*, p. 4), there appeared to Pre-Fab to be instances of movements of building materials plainly intended for use in buildings and, therefore, violative of the Commission's long interpretation of Part B and long recognition of the effect of the 1958 decision. Pre-Fab, accordingly, petitioned the Commission for clarification. The Commission's order of denial announced there was no need for clarification and that there would be no violation of the 1958 decision since the Commission did not intend to challenge any transportation of building materials intended for use in buildings, but only the transportation of building materials intended for use otherwise.**

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* *Oyler Motor Transit Co., Inc., Ext.—Building Materials*, 94 M.C.C. 638 (1963). The Commission there denied the authority Pre-Fab was protesting, leaving Pre-Fab technically uninjured. In *Owens Contract Carrier Application*, 100 M.C.C. 34 (1965), the Commission mentioned *Oyler*, but declined to pass upon the scope of Pre-Fab's authority.

** For example, asphalt, which is technically a "building material" is obviously usable for highway construction and other purposes, as well. Pre-Fab does not claim general authority to transport "building materials," irrespective of their intended use.

Pre-Fab also moved in the Southern Illinois District Court to enforce the judgment entered in the 1958 case. Commission counsel thereupon initiated negotiations with Pre-Fab eventuating in a consent order, entered by the Court, which dismissed the motion upon the Commission's assurance that it would not "relitigate" the 1958 issues and would not question in its investigatory proceeding any transportation of building materials intended for use in buildings.

In these two manners, the Commission reaffirmed its long-time construction of Part B and confirmed to Pre-Fab that no modification of its certificate, as so interpreted, would be made without due warning and a full opportunity to be heard as required by law. It, nevertheless, proceeded to modify Part B of Pre-Fab's certificate by its *Miami Transportation* holding.*

THE QUESTIONS ARE SUBSTANTIAL

This appeal brings to the Court novel and important questions of administrative law. Here, the Interstate Commerce Commission, in a case not itself involving any intrinsic procedural irregularity, so handled it in conjunction with other contemporary administrative proceedings as effectively to deprive Pre-Fab of a hearing and an opportunity to present its views. As a consequence, a sweeping construction of Part A, and a modification of Part B, of Pre-Fab's certificate were rendered in a proceeding where no plenary hearing was held or offered. The Commission was at all times fully aware

* We believe the Commission intended so drastically to restrict the scope of Part B as to involve its "modification," although its very-difficult-to-read opinion, coupled with what its counsel advised the District Court, has blurred its holding. Commission counsel, in arguing that Pre-Fab could transport building materials only if intended for use in "transportable" buildings, also advised the Court a "transportable" building might be transported in any number of trucks without losing its "transportable" character (referring to a recent Hilton Hotel as a "transportable" building).

that Pre-Fab desired, prior to any definitive interpretation of Part A of its certificate, an opportunity to present its views in a plenary hearing. The Commission further led Pre-Fab to believe, by the clearest of actions, that it did not contemplate modifying the long-settled interpretation of Part B.

Procedural regularity is essential in the preservation of the rights and liberties of litigants, for, as Mr. Justice Frankfurter has said, "The history of American freedom is, in no small measure, the history of procedure." *Malinski* v. *New York*, 324 U.S. 401, 414 (1945). The twin pillars of procedural regularity are the right to adequate notice and the opportunity to be heard. See *Hornsby* v. *Allen*, 326 F 2d 605, 608 (5th Cir. 1964). An opportunity to be heard is a worthless formula if there is no adequate notice of the issues to be heard or the claims of the agency. *Chicago, Burlington & Quincy Railroad Co. v. United States*, 242 F. Supp. 414 (N.D. Ill. 1965), *aff'd* 382 U.S. 422; *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938). Assuredly, these principles extrapolate to condemn what the Commission here did.

This case is unique in that it involves the interplay of several proceedings. Here, the Commission, having taken several actions in sharp depreciation of the significance of the first proceeding, and having focused Pre-Fab's attention on the dominance of a second, suddenly issued an across-the-board opinion in the first proceeding, cancelled the second proceeding, and contended Pre-Fab should have demanded, but failed to demand, a plenary hearing in the first. An expected and statutorily-compelled hearing cannot be avoided in this fashion.

The essential vice—the Commission's misleading Pre-Fab by its actions—was equally operative in regard to the construction of both Parts A and B of Pre-Fab's certificate. Pre-Fab's expectations of a hearing, and the Commission's actions in misdirecting Pre-Fab, were how-

ever quite dissimilar with respect to the two halves of Pre-Fab's authority.

Part A of Pre-Fab's certificate had never been construed and, because it contains such words of art at the heart of the modern building process as "prefabricating" and "precutting," requires full information as to the state of the rapidly evolving construction industry. Pre-Fab, aware that the Commission is not expert on "prefabrication" and conscious of its own burden and self-interest to inform the Commission, had expended over $120,000 in preparing for the hearing in the investigatory proceeding at which it expected to present a series of experts. The Commission's action, and only the Commission's action, aborted that hearing. The Commission, however, became formally well aware (as it had previously been aware informally) that Pre-Fab expected a thorough investigation via the traditional hearing process of the state of prefabrication. As to the Commission's interpretation of Part A of Pre-Fab's certificate, the fundamental fact remains—and cannot be obscured by any formula of words—that Pre-Fab desired a hearing focused on what constitutes "prefabrication," that the Commission was aware of it, that the Commission so arranged its proceedings as first to accord and then to eliminate a hearing, and that the Commission construed "prefabrication" on a record devoid of any information on this subject and without permitting Pre-Fab to tender its architectural and building experts.

We believe the Court below, although at the argument it showed a sharp awareness that Pre-Fab had never received the hearing it wanted, ultimately accepted the Commission's contention that Pre-Fab *should* have been aware that the Commission *might* undertake a definitive interpretation in the first, and minor, proceeding and, therefore, should have demanded a plenary hearing in it. But the actions which the Commission took could not have more effectively misled Pre-Fab as to the relative

importance of the two proceedings had it been deliberately so designed. After the filing of a trivial complaint case by a competitor, involving only the single movement of a single commodity (ornamental iron columns), the Commission undertook a general investigatory proceeding involving scores of movements of more than fifty commodities. In appraising the two proceedings it would have been irrational for Pre-Fab to have supposed that a definitive interpretation of "prefabrication" would derive from the first (single-commodity) case.

Moreover, as a realistic matter, it would have been profligate for Pre-Fab to have demanded a plenary hearing in the lesser of the two proceedings. In preparing for the general investigatory proceeding, Pre-Fab spent a significant sum. That proceeding was, however, of crucial importance to Pre-Fab and would fail of crucial importance only if the Commission discontinued it, as it did. On the other hand, the trivial complaint case involved only iron columns and could have, and logically should have, determined no more than the propriety of their movement. Since Pre-Fab had utilized both Parts A and B of its certificate in the movement (tacking the two at a common point), there was the further strong possibility that the Commission would make a finding as to only half of Pre-Fab's certificate, obviating any need for interpreting "prefabrication."

For the reasons given, we think it clear the Commission led Pre-Fab to believe, and that it was only rational to believe, that the investigatory proceeding was the proper and the sole proceeding for Pre-Fab to make its intended full-scale presentation. But, assuming *arguendo* that Pre-Fab was wrong and should have recognized that the Commission might do precisely what it did, this is not a position which the Commission should be allowed to sustain. Administrative agencies, charged with high responsibility to assure fair play, should not be permitted to deprive one whom they regulate of a hearing in this

manner. Pre-Fab should not have been compelled to guess at its peril which shell covered the pea.

Other principles of law render unfair and unsustainable what the Commission did in construing Part B of Pre-Fab's certificate. In a minimum 80 proceedings extending over a decade, the Commission and its staff had consistently recognized that, properly construed, Part B authorized Pre-Fab to transport building materials intended for use in buildings. Only once, by way of dictum in the 1963 *Oyler* case, did the Commission assert that Part B might have a more limited construction.

But, only shortly before the Commission's decision here challenged, the Commission's position on the interpretation of Part B had been presented for resolution in the most direct possible fashion, and the long-recognized interpretation had been twice explicitly confirmed. As explained (*supra*, p. 8), these two Commission actions both also flowed out of the general investigatory proceeding which the Commission had instituted. Since it appeared to Pre-Fab that the Commission was challenging movements well within the long-accepted interpretation of Part B, Pre-Fab filed a petition for clarification which reviewed the long history of Part B. The Commission denied the petition, holding clarification unnecessary since it did not intend to alter its long-held interpretation of Part B. The recital clauses of the Commission's denial order explicitly recognize that the 1958 Court decision had determined that Pre-Fab could transport building materials intended for use in buildings, and asserted the investigatory proceeding would not include any such movements.

Furthermore, in response to Pre-Fab's motion to enforce the 1958 judgment, the Commission sponsored a consent order which, in the most precise possible terms, embodied its recognition that Part B authorized the transportation of building materials intended for use in buildings.

It is thoroughly established that the Commission may not modify a motor carrier's certificate in the guise of interpretive action. *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554 (1958). The statute requires that modifications be made only after according the motor carrier notice and a full hearing. See Section 212 of the Motor Carrier Act, 49 U.S.C. Section 312. There is obviously no reason here for any claim that the Commission was not modifying, but merely interpreting, Part B of Pre-Fab's certificate. The long and consistent recognition by the Commission consequent on the 1958 Court decision puts beyond any question that the Commission could not depart from it without according the notice and hearing commanded by the statute. It was incumbent upon the Commission to advise Pre-Fab of the possibility it might modify Part B and to accord it the full hearing which it has not received.

CONCLUSION

This appeal presents substantial questions of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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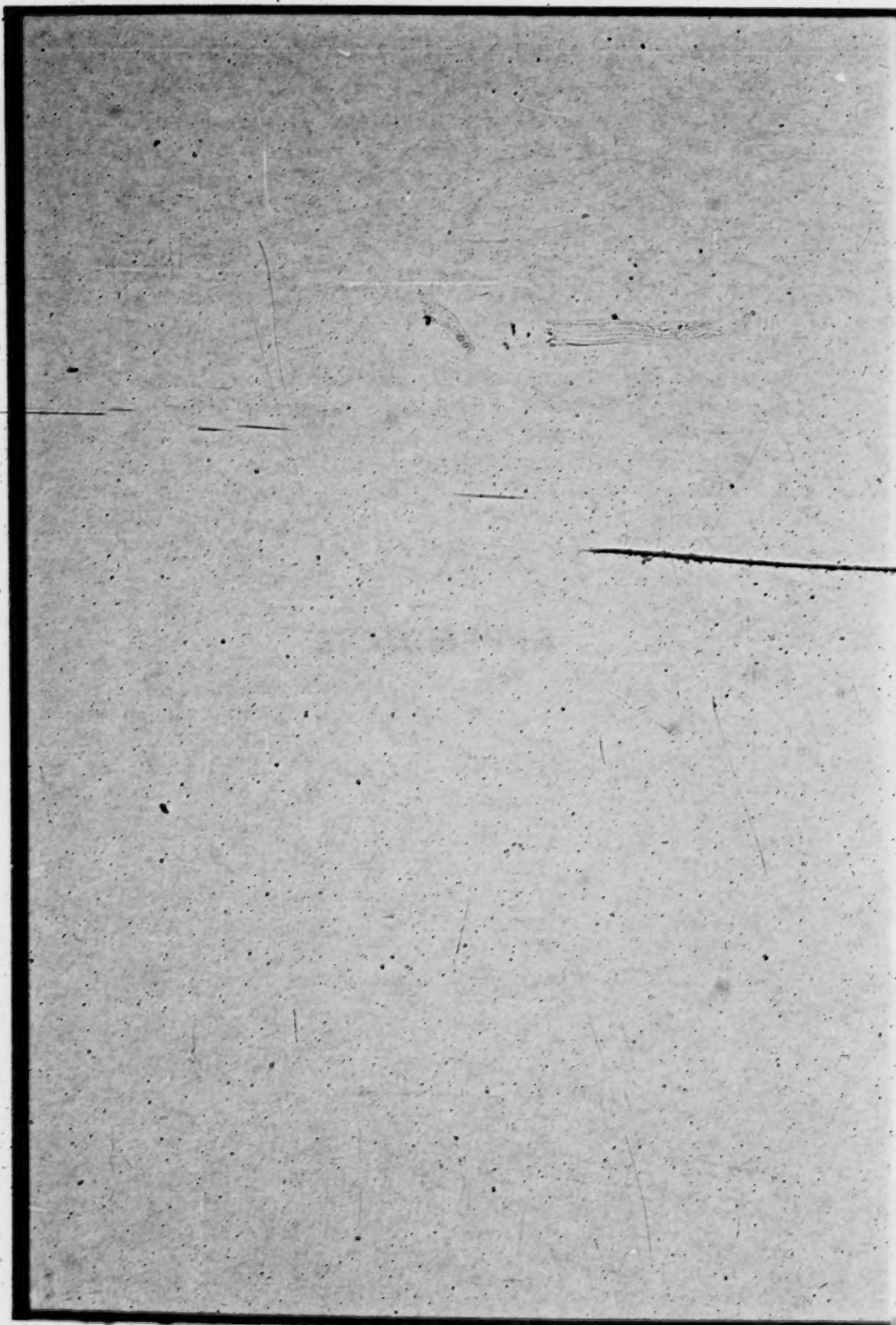
APPENDICES



APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Civil Action No. 2394

and

Civil Action No. 4376

PRE-FAB TRANSIT CO., PLAINTIFF

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

and

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, ET AL., INTERVENING DEFENDANTS

MEMORANDUM DECISION AND ORDER

Three-judge court consisting of Walter J. Cummings, Circuit Judge, United States Court of Appeals for the Seventh Circuit; Omer Poos, Chief Judge, United States District Court, Southern District of Illinois, Southern Division; and Robert D. Morgan, Judge, United States District Court, Southern District of Illinois, Northern Division.

POOS, DISTRICT JUDGE.

Nature of the Proceedings

Plaintiff Pre-Fab Transit Co., hereinafter referred to as Pre-Fab, brings Civil Action No. 4376 under Sections 1336, 1338, 2284 and 2321 through 2325 of Title 28, United States Code, to enjoin, annul and set aside the order of the Interstate Commerce Commission, herein-

after the I.C.C., served June 14, 1968 in *Miami Transportation Co., Inc. of Indiana* v. *Pre-Fab Transit Co.*, Docket No. MC-C-5102, which was reported at 107 M.C.C. 383. The I.C.C., in construing Pre-Fab's certificate of authority No. MC-107295, found that Pre-Fab exceeded its authority in transporting certain ornamental iron columns in interstate commerce. Pre-Fab attacks the order, alleging (1) that the I.C.C.'s interpretation of Part B of its authority is clearly erroneous and (2) that the I.C.C. denied Pre-Fab a full and fair hearing as to Part A of its authority.

In Civil Action No. 2394, Pre-Fab has moved to enforce a 1953 judgment of this Court, which judgment Pre-Fab alleges is authority for what it did in *Miami* and for what it wants to continue to do.

Facts

The facts of the case are not unduly complex, nor does there appear to be any dispute as to any material fact. Briefly, the complaint, exhibits, verified statements and Report of the Commission show that in February, 1966, Miami Transportation Company, Inc. of Indiana, hereinafter called Miami, which is one of the intervening defendants herein, filed a complaint with the I.C.C. alleging that Pre-Fab transported 1234 cartons of Ornamental iron columns from Louisville, Kentucky, to Dunbar, West Virginia, all in excess of its certificated authority.

Pre-Fab's Certificate of Public Convenience and Necessity, No. MC-107295 reads as follows:

Part A, allowing the transportation of—

(A) *Prefabricated and precut buildings or houses*, complete, knocked down, or in sections, and *all component* parts necessary to the construction, erection, or completion of such buildings or houses, when shipped with same . . . . and

Part B, allowing the transportation of—

(B) *Buildings*, complete, knocked down, or in sections, including all component parts, materials, supplies, and fixtures, and when shipped with such buildings, *accessories* used in the erection, construction, and completion thereof.

Pre-Fab's reply admitted the transportation of the iron columns but asserted that it was authorized by both Parts A and B of its certificate. Since only a matter of Commission analysis and interpretation of the Certificate remained, there being no factual dispute, an investigation was conducted pursuant to Modified Procedure, i.e., evidence was submitted without oral hearing by way of verified statements.

The I.C.C. examiner found a violation of Section 206(a) of the Interstate Commerce Act and recommended that a cease and desist order be issued. Pre-Fab excepted and the Commission, Division I, in its report and order of May 23, 1968, concurred in the examiner's findings and entered a cease and desist order.

Thereafter, on October 23, 1968, Pre-Fab filed in this Court its "Motion to Enforce Judgment", which alleged that the I.C.C.'s order in *Miami* was in contravention of this Court's judgment of July 31, 1958, in *Pre-Fab Transit Co.*, v. *United States and Interstate Commerce Commission*, Civil Action No. 2394. This Court then entered a temporary restraining order enjoining the effectiveness of the I.C.C. order in *Miami* until a final determination could be reached by a three-judge court as to the merits of the Commission's construction of Pre-Fab's certificate. After all parties had submitted written briefs, oral argument was held before this Court on June 23, 1969.

Limited Scope of Judicial Review

It is well settled in the law that, as a general rule, the scope of judicial review of administrative action with

regard to questions of fact is whether on the record as a whole the agency could reasonably make the finding that it did, i.e., the "substantial evidence test;" and, with regard to questions of law, whether the judgment of the expert body has warrant in the record and a rational basis in the law. See, generally, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *Gray* v. *Powell*, 314 U.S. 402 (1941); and the Administrative Procedure Act, Section 10, 5 U.S.C. Sec. 1001 et ff.

Courts recognize the comparative qualifications of court and agency to decide a particular issue, and agencies and their staffs are often deemed experts within their own specialized fields. Although talk of agency expertise often suffers from overkill, that fundamental proposition has merit in it. Congress has delegated power and authority to the various agencies intending them to do their respective jobs and reach practical results in terms of providing governmental services. Agency expertness in the field most often follows. Thus, this court is inclined to give great weight to the Commission's latest considered interpretation of Pre-Fab's certificate, even though it apparently, to some degree, represents a change of mind by the experts.[1] I.C.C. may change its mind on certificate interpretation if the final determination is sound. See *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561 (1958), and *Sims Motor Transport Lines, Inc.* v. *United States*, 183 F.Supp. 113, 119, (1959), affirmed 362 U.S. 637 (1960).

The 1958 Court Decision

Pre-Fab relies upon the judgment entered on July 31, 1958 by this Court in *Pre-Fab Transit Co.*, v. *United*

[1] Pre-Fab points out that in numerous prior Commission proceedings since 1958 and in a consent order filed in this court in 1967, I.C.C. yielded to interpretations of Part B of Pre-Fab's lead certificate which was broader than adopted in the present case; and Pre-Fab argues that I.C.C. should be held to its broadest prior interpretation. It is noted that Pre-Fab had the benefit of any such earlier breadth of interpretation while it existed.

States and Interstate Commerce Commission as authority under Part B for its transporting building materials generally, such as ornamental iron columns.

Our reading and analysis of that proceeding leads us to conclude that Pre-Fab has incorrectly interpreted that decision. All that was decided there was that Pre-Fab could transport in independent shipments building materials which were intended to be used as a part of some determinable building in the future. The Court there reversed the I.C.C.'s ruling in *Whitehouse Trucking, Inc.* v. *Pre-Fab Transit Co.*, 71 M.C.C. 155 (1957) that Pre-Fab could haul window frames to the plant of a prefabricated building manufacturer only when Pre-Fab was simultaneously hauling buildings. This Court now reaffirms the soundness of that 1958 decision in allowing building materials, including component parts, of future transportable buildings to move independently of, and not as part of the same shipment of, the entire buildings. This is not the same, however, as holding that Pre-Fab has authority to ship "building materials" in general, such authority being a much wider grant than the 1946 history and subsequent events show was applied for by Pre-Fab or granted by the Commission.

Therefore, we conclude that Pre-Fab's reliance on the 1958 judgment as authority for the act complained of in *Miami* is misplaced. It often happens that the parties most directly concerned with a court opinion do not always carefully read that court opinion.

Part B of the Certificate

It is agreed among the parties that under Part A of its authority, Pre-Fab cannot transport an independent shipment of any component, let alone ornamental iron columns destined for a general distribution warehouse. Rather, shipments under Part A must be comprised of "prefabricated or precut buildings or houses," which includes component parts for same. Thus, a question re-

maining for resolution is whether the Commission's interpretation of the Part B authority in this factual situation is supported by a rational basis.

We find it is so supported. Part B of the certificate is limited by the "intended use" restriction, which is a commodity description technique long used by the Commission as a practical necessity whenever the use of specific names or generic terms as means of identifying authorized transportable commodities in a certificate would prove impractical. See, *e.g.*, *Nelson, Inc.* v. *United States*, 355 U.S. 554 (1958).

The Commission points out in its report at p. 388 that:

> In determining whether particular shipments are intended for use in the required manner, the carrier may presume they will be so used if the commodities involved are of a type predominantly used in that manner, and it may transport them without further investigation, provided it has no knowledge of a contrary intention. On the other hand, if the commodities have general utility in other fields, they may be transported only if it is definitely established by the carrier in the particular case that they are intended for the required use. See 107 M.C.C. 383 at p. 388.

Just as we find that under Part A of its certificate, Pre-Fab's authority is characterized by the term "prefabricated and precut buildings or houses", so do we conclude, as did the Commission in its report (107 M.C.C. 383 at pp. 389-390) that under Part B, Pre-Fab's authority to transport commodities is clearly limited, restricted and characterized by the phrase "buildings, complete, knocked-down, or in sections," and it cannot reasonably be construed as "building(s) . . . materials" generally. See, also, Oyler Motor Transit Co., Inc.,—Ext.—Building Materials, 94 M.C.C. 638, wherein the Commission previously found that under its certificate No. MC-107295 Pre-Fab was not authorized to transport "building materials" generally.

The materials Pre-Fab transports must be related to either transportable "buildings" or "prefabricated and precut buildings or houses;" or so destined. We are convinced the Commission's finding that the ornamental iron columns in question constituted "standarized (sic) building material" in general was, under all the circumstances, the only reasonable conclusion to be reached when measured by the whole context of Pre-Fab's certificate. Pre-Fab's acts, complained of in *Miami*, amount to a plain and simple unilateral enlargement of its certificated authority, in violation of Section 206(a) of the Interstate Commerce Act, 49 U.S.C. Section 306(a) and in derogation of the economic rights of the intervening defendants, all of which are authorized by the Commission to transport in interstate commerce "building materials" generally within a specific geographical area.

The Denial of Hearing Claim

Regarding Pre-Fab's claim of the denial of a fair hearing by the Commission in *Pre-Fab Transit Co.—Investigation and Revocation of Certificates*, Docket No. MC-C-5106, the Court is fully aware of its duty to stand watchdog for any procedural due process deficiencies on the part of an administrative agency which adversely affects any party.

With this in mind, the court has considered the arguments advanced by Pre-Fab together with the sequence of events as disclosed by the cold record herein, and we conclude that the allegations are without substantial merit, further treatment of which would do little to enlighten this opinion and, in any event, is unnecessary to the proper disposition of the case now before the Court.

In conclusion, therefore, the Court Finds that the Interstate Commerce Commission on this record properly and reasonably decided the issues presented, and we hereby affirm the Commission's decision. Accordingly, Plaintiff Pre-Fab's complaint in Civil Action No. 4376 is Dis-

missed, its motion to enforce judgment in Civil Action No. 2394 is Denied, and the order restraining the effectiveness of the Commission's report and order is hereby set aside and vacated.

It Is So Ordered.

ENTERED at Springfield, Illinois this 3 day of September, 1969.

/s/ Walter J. Cummings
WALTER J. CUMMINGS,
Circuit Judge, Presiding

/s/ Omer Poos
OMER POOS,
District Judge

/s/ Robert D. Morgan
ROBERT D. MORGAN,
District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
Office of the Clerk
Southern District of Illinois

William J. Littell
Clerk

Springfield, Illinois 62705
September 26, 1969

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Springfield, Illinois 62701

RE: Bre-Fab Transit Co., an Illinois Corporation vs. United States of America et al., Civil 2394 and 4376

Dear Sirs:

Please be advised that the following docket entry was entered on September 26, 1969 in the above-entitled case:

By unanimous vote of the Three-Judges hearing this case —It is ordered that the Motion to Amend Judgment or to Grant a New Trial is denied.

Yours very truly,

/s/ William J. Littell
WILLIAM J. LITTELL,
Clerk

WLJ OH

APPENDIX C

STATUTES INVOLVED

Section 206(a)(1) of Part II of the Interstate Commerce Act (49 U.S.C. § 306(a)(1)) reads, in part, as follows:

> Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . .

Section 212(a) of Part II of the Interstate Commerce Act (49 U.S.C. § 312(a)) reads as follows:

> Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304 (c) of this title, commanding obedience to the pro-

vision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

PRE-FAB TRANSIT CO.,
Appellant,
v.
UNITED STATES OF AMERICA, and
The INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Intervening Defendants, MIAMI TRANSPORTATION COMPANY, INC., DARLING FREIGHT, INC., GRAFF TRUCKING CO., INC., MELTON TRUCK LINES, INC., REED LINES, INC., SENTLE TRUCKING CORPORATION, DEATON, INC., DIRECT TRANSIT LINES, INC., JOYCE TRUCKING CO., MICHI-

GAN TRANSPORTATION CO., ST. LOUIS FREIGHT LINES, and WENHAM TRANSPORTATION, INC., move that the judgment of the District Court be affirmed.

STATEMENT

The Appellees herein adopt the United States of America and the Interstate Commerce Commission's statement of facts as presented to this Court in their Motion to Affirm.

ARGUMENT

1. This appeal presents no substantial question worthy of full consideration by this Court. The district court after careful consideration of all the facts surrounding the sequence of events leading to this action and the arguments advanced by Pre-Fab that they were denied a fair hearing by the Interstate Commerce Commission correctly rejected said arguments and found that the Interstate Commerce Commission acted properly and reasonably in deciding the issues presented. J.S. App. A 17. Furthermore, the District Court correctly found that the Interstate Commerce Commission interpreted the authority of Pre-Fab and that said interpretation in the factual situation presented said Court is supported by a rational basis. J.S. App. A 20.

The District Court in arriving at this conclusion stated:

> It is well settled in the law that as a general rule, the scope of judicial review of administrative action with regard to questions of fact is whether on the record as a whole the agency could reasonably

make the finding that it did, i.e., the "substantial evidence test;" and, with regard to questions of law, whether the judgment of the expert body has warrant in the record and a rational basis in the law. See, generally, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Gray v. Powell*, 314 U.S. 402 (1941) and the Administrative Procedure Act, Section 10, 5 U.S.C. Sec. 1001 et ff. (U.S. App. 17 and 18).

The decisions in this respect leave no questions as to the status of the law on this question.

In regard to the claim of Pre-Fab that the Interstate Commerce Commission restricted the Certificate of Pre-Fab, (J.S. 5), it is submitted that no restriction has been imposed upon the Pre-Fab Certificate as a result of the action by the Commission. Rather, the Commission under the authority of Sections 204(c) and 212(a) of the Interstate Commerce Commission Act (hereinafter referred to as the Act), 49 U.S.C. Sections 304(c); 49 Stat. 546 and 312(a); 49 Stat. 558, sought to determine whether Pre-Fab, in violation of Section 206(a) of the Act, 49 U.S.C. (306(a), 49 Stat. 561, had been transporting commodities as a common carrier by motor vehicle, not authorized by its Certificate, bearing Docket Number MC-107295 (Part A and Part B). By interpreting Pre-Fab's Certificate, the Commission did not restrict, modify, alter or revoke any portion of the Certificate, but rather clearly indicated what operating authority Pre-Fab had actually been granted. *Malone Freight Lines, Inc. v. United States*, 107 F. Supp. 946.

The interpretation of a certificate issued by the Commission is a question solely for that agency, *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, and, unless such interpretation is clearly erroneous, it is controlling on the courts. *Jackson G. Nelson, Inc. v. United States*, 355 U.S. 554. In proceedings instituted under Section 204(c) and

212(a) of the Act the Commission is the administrative body charged with the interpretation of certificates of its own creation. In *J. B. Action, Inc. v. United States,* 221 F. Supp. 174, the court pointed out the formidable expertise of the Commission in the interpretation of its own certificates. It is the obligation of the court to recognize the Commission's skill and judgment in its field; and as such, it is not for the court to determine whether the court would have arrived at the same conclusion as the Commission did. *Columbia Transportation Co. v. United States,* 167 F. Supp. 5. The District Court recognized this long established principle and held:

> Courts recognize the comparative qualifications of court and agency to decide a particular issue, and agencies and their staffs are often deemed experts within their own specialized fields. Although talk of agency expertise often suffers from overkill, that fundamental proposition has merit in it. Congress has delegated power and authority to the various agencies intending them to do their respective jobs and reach practical results in terms of providing governmental services. Agency expertness in the field most often follows. Thus, this court is inclined to give weight to the Commission's latest considered interpretation of Pre-Fab's certificate, even though it apparently, to some degree, represents a change of mind by the experts.[1] I.C.C. may change its mind on certificate interpretation if the final determination is sound. See *Nelson, Inc. v. United States,* 355 U.S. 554, 561 (1958), and *Sims Motor Transport Lines, Inc v. United States,* 183 F. Supp. 113, 119, (1959), affirmed 362 U.S. 637 (1960). (J.S. App. A. 18).

2. It is accordingly manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

CONCLUSION

The District Court's decision is clearly correct and no substantial question is presented by this appeal. It is respectfully submitted that the judgment be affirmed.

Dated this 19th day of January, 1970.

Respectfully submitted,

ROBERT A. SULLIVAN,

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Attorneys for Appellees.

ROBERT A. SULLIVAN,
Of Counsel.

January, 1970.

SUPREME COURT, U. S.

FILED

JAN 19 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 988

PRE-FAB TRANSIT CO., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal From the United States District Court for the Southern District of Illinois, Southern Division

MOTION TO AFFIRM OF APPELLEE HENNIS FREIGHT LINES, INC.

McINNIS, WILSON, MUNSON & WOODS
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Washington, D. C. 20006
Attorneys for Appellee Hennis Freight Lines, Inc.

January, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

PRE-FAB TRANSIT CO., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal From the United States District Court for the Southern District of Illinois, Southern Division

---

MOTION TO AFFIRM OF APPELLEE HENNIS FREIGHT LINES, INC.

Appellee, Hennis Freight Lines, Inc., pursuant to Rule 16 of the Rules of this Court, moves that the judgment of the District Court be affirmed for the reasons upon which the District Court based its Memorandum Decision and Order (Jurisdictional Statement, App. A). It is manifest that the questions on

which the decision of the cause depends are so unsubstantial as not to need further argument.

WHEREFORE, the judgment of the District Court should be affirmed.

Respectfully submitted,

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January, 1970

SUPREME COURT, U. S.

FILED
JAN 23 1970
JOHN F. DAVIS, CLERK

No. 988

In the Supreme Court of the United States

OCTOBER TERM, 1969

PRE-FAB TRANSIT CO., APPELLANT

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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Solicitor General,
RICHARD W. McLAREN,
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NAHUM LITT,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 988

PIE FAR TRANSIT CO., APPELLANT

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal by a motor common carrier from a final judgment of a three-judge district court (J.S. App. A) dismissing its complaint to set aside an order of the Interstate Commerce Commission (107 M.C.C. 383) which interpreted the scope of the commodity description in the appellant's certificate of public convenience and necessity.

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Appellant, a motor common carrier, is authorized by its certificate of public convenience and necessity (J.S. App. A, 16–17) to transport:

> (A) *Prefabricated and precut buildings or houses,* complete, knocked-down, or in sections, and *all component parts* necessary to the construction, erection, or completion of such buildings or houses, when shipped with same, and
>
> (B) *Buildings,* complete, knocked-down, or in sections, including all component parts, materials, supplies, and fixtures, and when shipped with such buildings, *accessories* used in the erection, construction, and completion thereof. [Emphasis in original.]

In 1966, Miami Transportation Co., Inc., filed a complaint with the Interstate Commerce Commission alleging that Pre-Fab had exceeded its authority by transporting an independent truckload of ornamental iron columns to a general distributor. Since Pre-Fab admitted its carriage of the columns and there was no dispute as to the facts, the case went before a Commission hearing examiner under modified procedures (49 C.F.R. 1100.45, *et seq.;* J.S. App. A, 17). Appellant contended that under its certificate the transportation of the iron columns was proper, but the hearing examiner concluded that neither Part A nor Part B of the certificate authorized such carriage (J.S. App. A, 17).

After full administrative proceedings, the Commission, through Division 1, held that Pre-Fab's certificate did not permit the transportation of independent shipments of ornamental iron columns; Part A did

not authorize independent shipments or movements to general distributors[1] and Part B limited appellant to transporting commodities intended for use in a prefabricated house or building (107 M.C.C. at 389–390). It concluded that appellant's proffered interpretation of the certificate was contrary to the long-standing administrative distinction between "prefabricated building" authority and "building material" authority, and that it was tantamount to a claim of authorization to transport "building materials" (*ibid.*). Appellant sought review of the Commission's order, alleging that the Commission's interpretation of the Part B authority was erroneous, and that it had been denied a full and fair hearing (J.S. App. A, 16).

The three-judge district court unanimously sustained the Commission, holding that the Commission's interpretation was "under all circumstances, the only reasonable conclusion to be reached when measured against the whole context of Pre-Fab's certificate," and that Pre-Fab's interpretation amounted to "a plain and simple unilateral enlargement of its certificated authority" (J.S. App. A, 21). The court also held that appellant had not been denied procedural due process. (*ibid.*) Appellant's motion to amend the judgment or for a new trial was denied (J.S. App. B).

ARGUMENT

1. The primary question presented by this appeal—whether appellant's certificate authorizes the carriage

[1] Appellant subsequently admitted in the district court that under no construction of Part A of its certificate could it transport an independent shipment of ornamental iron columns (J.S. App. A, 19).

of "building materials" generally, as distinct from carriage limited to the prefabricated building industry—does not warrant plenary review by this Court. The district court, after noting that appellant admitted it was not authorized to perform the challenged transportation under Part A, correctly held that the Commission's interpretation of the Part B authority was "the only reasonable conclusion to be reached" (J.S. App. A, 19, 21). The interpretation of a certificate issued by the Commission is primarily a question for that agency. *Service Transfer Co.* v. *Virginia*, 359 U.S. 171. Unless the Commission's interpretation is clearly erroneous, it should be upheld by the courts. *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561. Moreover, the Commission's interpretation of this type of authority is not a matter of first impression: A similar restriction was interpreted in the same manner in *Whitehouse Trucking, Inc.* v. *United States*, 261 F. Supp. 9 (N.D. Ohio), affirmed *per curiam*, 388 U.S. 453.

2. Contrary to appellant's contention (J.S. 10), there was no procedural irregularity in the Commission's disposition of this proceeding. Pre-Fab received full and fair consideration in this proceeding as required by the Administrative Procedure Act. *National Trailer Convoy, Inc.* v. *United States*, 293 F. Supp. 630, 632–633 (N.D. Okla.). Prior to the Commission's decision, appellant had not requested either an oral hearing or a consolidation of the proceeding with any other pending case. The district court, which was "fully aware of its duty to stand watchdog for any procedural due process deficiencies," found that

"the allegations are without substantial merit" (J.S. App. A, 21). The material which appellant claims it was denied an opportunity to present, by the cancellation of a separate hearing in another proceeding, would in no way have justified the transportation of independent truckloads of any commodity under Part A authority (J.S. App. A, 16).[2] Nor is it true as appellant argues (J.S. 11) that the words of art in its certificate had not been previously construed. On the contrary, they were at issue and were discussed in detail, for example, in the underlying Commission report in the *Whitehouse Trucking* case, *supra* (99 M.C.C. 621).

Appellant alleges that the Commission's construction of its certificate in this proceeding was an unexpected departure from prior decisions (J.S. 13). But in the cases relied upon by the Commission, *Ogler Motor Transit Co., Inc.—Ext.—Building Materials*, 94 M.C.C. 638 (Division 1), and *Owens Contract Carrier Application*, 100 M.C.C. 34 (full Commission), the Commission construed the Part B authority against ap-

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[2] The present case was instituted by the filing of Miami Transportation's complaint with the Commission on February 9, 1966. The hearing to which appellant refers was scheduled in another proceeding entirely separate and distinct from this case. Several weeks after the commencement of this case, the Commission ordered a separate, general investigation of Pre-Fab's operations. On demand of appellant, the Commission agreed to exclude from that proceeding any inquiry into the scope of appellant's authority under Part B of its certificate. Thus defined, the hearing would only have dealt with Part A. But, as appellant now concedes (J.S. App. A, 19), Part A does not authorize independent carriage of iron columns.

pellant's position.[1] Thus, appellant's contention that the Commission reversed without notice a consistent administrative construction is incorrect.

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. MCLAREN,
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HOWARD E. SHAPIRO,
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Deputy General Counsel,
NAHUM LITT,
Attorney,
Interstate Commerce Commission.

JANUARY 1970.

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[1] Since Pre-Fab was a protestant in those proceedings, the Commission invited it to file a petition seeking a definitive interpretation of its operating authority. This procedure was invoked because the district court in *Parkhill Truck Company* v. *United States*, 198 F. Supp. 362 (N.D. Okla.), had held that the interpretation of a protesting carrier's certificate should not be definitively made except after a plenary hearing. Appellant strenuously argued its interpretation of its certificate to the Commission in both the *Oyler* and *Owens* proceedings.

U.S. GOVERNMENT PRINTING OFFICE 1970

SUPREME COURT, U. S.
FILED
FEB 6 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 988

PRE-FAB TRANSIT CO.,
Appellant

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION *et al.*,
Appellees

On Appeal from the United States District Court for the Southern District of Illinois, Southern Division

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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February 6, 1970

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 988

PRE-FAB TRANSIT CO.,
Appellant

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION *et al.*,
Appellees

On Appeal from the United States District Court for the Southern District of Illinois, Southern Division

---

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

Respondents' claims that this appeal presents no substantial questions warranting review are founded on error. This appeal does not, as respondents would have it, involve the interpretation of a motor carrier certificate. Rather, this appeal presents a novel and important question of administrative law—whether the Commission may effectively deny a motor carrier the opportunity to be heard on the interpretation and modification of its certificate by misleading it to believe that the opportunity to be heard will be accorded, and the interpretation and modification made, in another proceeding.

Complaints of the type which the Commission had before it in March 1966—that by a competitor of Pre-Fab, alleging that Pre-Fab had unlawfully transported one load of ornamental iron columns from Kentucky to West Virginia—are routine and even commonplace in the highly competitive motor carrier industry. Pre-Fab had no reason to suppose that this complaint proceeding would go beyond determining the propriety of its hauling ornamental iron columns. Any initial doubts as to the scope of the case would have been immediately dispelled. The Commission took two steps in sharp derogation of its significance, making it irrational to suppose it could serve as a vehicle for a sweeping interpretation or modification of Pre-Fab's certificate.

1. Most importantly, the Commission, one month after the competitor's complaint, launched on its own motion a full-scale investigation of Pre-Fab's operations whose scope and seriousness is apparent from its title—*Pre-Fab Transit Co.—Investigation and Revocation of Certificates* (Docket No. MC-C-5106). Subsequently, the Commission formally advised Pre-Fab that the investigation would involve over 100 movements of more than 50 types of commodities. Manifestly, this proceeding was specifically conceived and instituted to serve as a proper basis for a comprehensive inquiry into and interpretation of Pre-Fab's authority.

2. The Commission designated the complaint case for modified procedure. This is a procedure whose basic propriety in appropriate proceedings we do not challenge. But, since it avoids an oral hearing and reaches determinations on the basis of a paper record only, a case utilizing this procedure is a dubious vehicle for reaching fundamental determinations and is not appropriate where a respondent is known to desire an oral hearing and can compel it. Obviously, designating the complaint case for modified procedure, when taken together with the Commission's institution of a comprehensive investi-

gatory proceeding, was tantamount to advising Pre-Fab that the complaint case would involve only the propriety of its hauling ornamental iron columns and that the investigatory proceeding was the overriding one in which Pre-Fab would fully be heard and which would doubtless culminate in a full-fledged interpretation of its certificate.

We made clear in our jurisdictional statement, and respondents do not deny, what occurred. Through the sole fault of the Commission, a scheduled hearing in the investigatory proceeding aborted. The Commission rescheduled, postponed, rescheduled and then eliminated the hearing by cancelling the proceeding. It did so because it had taken the complaint case, pigeonholed for some two years and almost forgotten, blown the dust off its two or three substantive pages of affidavits, and issued a sweeping interpretation of both Part A and Part B of Pre-Fab's certificate. The hearing dangled before Pre-Fab in the general investigatory proceeding was thus denied, and Pre-Fab is now told that if it wanted an oral hearing, it should have so requested in the complaint case.

AS TO PART A

The key word in Part A of Pre-Fab's certificate, which has never been construed, is "prefabricated." It was clear to Pre-Fab, through both formal and informal contacts with the Commission, that the Commission's understanding of what constitutes a "prefabricated building" differed markedly from Pre-Fab's and, as Pre-Fab sought to demonstrate, from the understanding of those engaged in the rapidly evolving art of prefabrication. Pre-Fab's self-interest sharply dictated that it use the first opportunity to present the Commission a full exposition of "prefabrication," as this building art is now understood and employed.

That opportunity was offered Pre-Fab by the Commission's institution of its wide-ranging investigatory proceeding. Pre-Fab reacted accordingly. As the affidavit of its general counsel advised the District Court, Pre-Fab "engaged in a massive effort to obtain for presentation to the Commission in [the investigatory proceeding] a complete and exhaustive exposition of information and expert opinion which would inform the Commission of the state of the art of prefabrication and enable it properly to interpret Pre-Fab's certificates." * The Commission was, both formally and informally, aware of Pre-Fab's intentions, having been formally made so aware when Pre-Fab appeared at the aborted hearing, ready to present the first of its series of experts.

The Motions to Affirm simply do not come to grips with these truths. Instead, the Commission now urges that "appellant had not requested either an oral hearing [in the complaint case] or a consolidation of the proceeding with any other pending case" (Motion to Affirm, p. 4). But Pre-Fab did not request an oral hearing in the complaint case, or its consolidation with any other proceeding, because the Commission's overall handling of the several proceedings reasonably led Pre-Fab to believe that the investigatory proceeding was the intended vehicle for any interpretation of Part A of Pre-Fab's authority, and that it, not the minor complaint case, was the appropriate proceeding wherein Pre-Fab would be fully heard. The Commission has still failed to provide the answer to the question which District Judge Morgan put at the argument below:

> "What I can't understand at all is if the Commission felt it could properly and intended to make this broad decision that it has done now in the Miami case, why

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* The affidavit further informed the District Court that Pre-Fab intended to present at least eight experts from a list of sixteen whose names and qualifications were provided, and that Pre-Fab spent over $120,000 in preparation for the investigatory proceeding.

did it file 5106, the investigation case, and set it for hearing and notice it for hearing, unless it was to mislead somebody, why, why did it do it?"

The Commission argues (Motion to Affirm, p. 5) that denial of a hearing was not consequential since Pre-Fab could not have established at a hearing that its transportation of ornamental iron columns was justified under Part A of its certificate. This conclusion is based on an alleged Pre-Fab concession (Motion to Affirm, pp. 3, 5) that Part A does not authorize an independent shipment of ornamental iron columns. Even had Pre-Fab so conceded, which it did not,* such a concession would in no way justify what the Commission did here. Pre-Fab complains because the Commission undertook a sweeping construction of what constitutes "prefabrication" without giving Pre-Fab a hearing and an opportunity to present the Commission with expert testimony as to the present state of the art. It is not an answer—it is beside the point—for the Commission to argue that Pre-Fab, even if given a hearing, could not have shown that the transportation of ornamental iron columns is authorized by Part A of its certificate.

AS TO PART B

The Motions to Affirm also fail to come to grips with the illegal manner in which the Commission reversed its consistent interpretation of Part B of Pre-Fab's certificate, as evidenced in over 100 Commission decisions rendered over a period of ten years. This is clearly to modify Pre-Fab's authority and, as a modification, required hearing under Section 212 of the Motor Carrier Act (49 U.S.C. § 312). See J.S., p. 14). But the Commission,

* The District Court's attribution of such a concession to Pre-Fab misreads the hearing transcript before it. All Pre-Fab's counsel said was that Pre-Fab might not have thought it worth a law suit had the Commission simply determined that the movement of ornamental iron columns (for which Pre-Fab received revenues of $194.16) was outside the scope of Part A of its certificate.

twice explicitly denying in the general investigatory proceeding that it had any intention to do so, utilized the minor complaint case to modify Part B by overturning the long-accepted interpretation.

The Commission had recognized since 1958 that, as a result of judicial interpretation, Part B conferred authority on Pre-Fab to transport building materials independently of buildings.* Again and again, and in a variety of ways, with only the single exception which the Motion to Affirm points out (*Oyler Motor Transit Co., Inc., Extension—Building Materials*, 94 M.C.C. 638 (1963)), the Commission reaffirmed the authority of Pre-Fab to transport building materials intended for use in buildings. We cited to the District Court 86 cases in which Pre-Fab protested, sometimes successfully and sometimes not, applications by others in which Pre-Fab's standing to oppose depended upon its authority to transport building materials, and in which a Commission examiner, a joint board, a review board and or the Commission explicitly or implicitly recognized that it had such authority. Additionally, in scores of application proceedings instituted by Pre-Fab, in response to inquiries by the public, and in accepting tariffs for trans-

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* In 1957, in *Whitehouse Trucking, Inc.* v. *Pre-Fab Transit Co.*, 71 M.C.C. 155, the Commission had held that Pre-Fab's Part B authority to transport "*Buildings*, complete, knocked down, or in sections, including all component parts, materials, supplies, and fixtures, . . ." authorized transportation of component parts, materials, supplies, and fixtures only if transported "in connection with" a complete building. The District Court for the Southern District of Illinois reversed, concluding that Pre-Fab could transport component parts, materials, supplies, and fixtures "independently of or in connection with" the transportation of buildings. *Pre-Fab Transit Co.* v. *United States*, C.A. No. 2394 (1958). The Commission's contemporary actions clearly recognized the force of the District Court's opinion as authorizing the transportation of building materials intended for use in buildings. For example, it accepted tariffs on general building materials which it had previously suspended on the restrictive view expressed in the *Whitehouse* case.

porting building materials, the Commission confirmed its view that Part B authorized the transportation of building materials intended for use in buildings.

Had there been any lingering doubt as to the proper interpretation of Part B—for example, a doubt deriving from the *Oyler* opinion—two Commission actions in the general investigatory proceeding would have set it to rest. As we pointed out in our Jurisdictional Statement (pp. 8-9), Pre-Fab was concerned that the general investigatory proceeding included inquiry about movements within the scope of Part B as consistently interpreted. It, therefore, petitioned the Commission for clarification and moved the District Court for the Southern District of Illinois to enforce its 1958 judgment. The Commission, in disposing of the clarification petition, explicitly stated that it had no intention of questioning any movement of building materials intended for use in buildings, but only movements of customary building materials actually intended for other uses. As to the judicial proceeding, the Commission procured the entry of a consent order which said *in haec verba* that it did not propose to "relitigate" the 1958 decision and would not challenge the movement of building materials intended for use in buildings.

The District Court's understated comment upon this long and almost invariable record of interpretation was to note that the Commission's current interpretation of Part B "apparently, to some degree, represents a change of mind by the experts" (J.S., p. 18). In an appended footnote, the District Court went on to say that "Pre-Fab had the benefit of any such earlier breadth of interpretation while it existed." This is serious error. Pre-Fab's reasonable belief that it had authority to transport building materials in the ten-state geographical area covered by Part B caused it to limit the scope of many applications.* Had Pre-Fab's authority been modified in

* To illustrate, Pre-Fab's Sub 124 application resulted in authority to transport roofing slabs from a Wisconsin county to 28 states, excluding, in addition to 12 western states, the 10 Part B states to

1958, as it has now been in 1968, applications by Pre-Fab in the intervening years would have been quite different and might have compensated in large measure for what Pre-Fab will, but for this Court, now lose.

The Commission's handling of the complaint and general investigatory proceedings perpetrated on Pre-Fab the same essential type of deception as to Part B as was done in respect of Part A. In the general investigatory proceeding, Pre-Fab appropriately challenged, both before the Commission and in court, the possibility that that proceeding threatened a departure from the long-established interpretation of Part B. In both Commission and judicial proceedings the Commission rejected with emphasis the notion that it contemplated any such departure. It then utilized the no-hearing, one-commodity complaint case to do precisely what it had denied was contemplated in the general investigatory proceeding.

In these circumstances, the Commission's defense that Part B was lawfully modified because Pre-Fab failed to request a hearing (Motion to Affirm, p. 4) is not an adequate one. Pre-Fab did not request an oral hearing in the complaint case because the Commission so handled it in conjunction with the general investigatory proceeding as to mislead Fre-Fab. Notably, the Commission does not argue that Pre-Fab was not entitled on demand to an oral hearing. Implicit in the Commission's argument that Pre-Fab waived its right to a hearing is recognition that Pre-Fab otherwise would have had a statutory right to an oral hearing because its certificate was "reinterpreted" to the point of modification.

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which the bulk of the traffic would normally move. The Commission recognized the inclusion of these 10 states was unnecessary, as authority to transport roofing slabs within them was already conferred by Part B of Pre-Fab's certificate. Similarly, Pre-Fab's Sub 135 application authorized the transportation of wallboard, hardboard, and doors from an Ohio county to nearly all the states east of the Rocky Mountains, but again excluding the vital 10-state Part B area on the theory that Part B already conferred authority.

Apart from the statutory legal requirement for a hearing before the certificate may be modified, a hearing is urgently needed in the interests of clarification. What Part B authorizes Pre-Fab to transport is now hopelessly muddled. The *Oyler* thesis that Pre-Fab was authorized to transport only materials intended for use in buildings themselves physically capable of transportation has obvious intrinsic and linguistic difficulties and was apparently deemed insupportable by the Commission. The present complaint case, in asserting that Pre-Fab could carry only such materials as "have the character of buildings" appears meaningless. In the District Court Commission counsel did not support that formula of words but asserted Pre-Fab might transport materials intended for use in "transportable" buildings. Then, by defining a "transportable building" as not excluding a Hilton hotel, he left us possibly without an issue as to Part B but certainly bewildered. The Motion to Affirm (p. 3) now asserts that Pre-Fab may transport only commodities intended for use in a "prefabricated house or building." Of all possible interpretations this one is the most certainly wrong. Part B of Pre-Fab's initial certificate authorized the transportation of "prefabricated buildings . . . including . . . materials . . .". Within a year, the Commission struck "prefabricated" upon an explicit finding that the authority should not be so confined.

CONCLUSION

The question which Pre-Fab's appeal presents—not those which respondents erroneously say it presents—is manifestly substantial and warrants plenary consideration. Probable jurisdiction should be noted.

Respectfully submitted,

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February 6, 1970

SUPREME COURT OF THE UNITED STATES

October Term, 1969

PRE-FAB TRANSIT CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 988. Decided February 24, 1970

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.